

adequate video, voice and/or data signal and the cross-polarization discrimination characteristics of current technology, no service benchmark can be set.

2. The Commission Should Impose Interim Service Benchmarks On LMDS Licensees To Further Deter Speculation.

As noted in the preceding section, WCA is supportive of the Commission's proposal to require a LMDS licensee to serve 90% of its service area within three years of securing an initial license. WCA believes, however, that the Commission should impose interim service benchmarks in order to deter speculative applications and expedite the provision of service to the public. In connection with a variety of recently authorized services, the Commission has recognized that interim service benchmarks are an effective tool for deterring speculation and required that licensees of multi-site facilities demonstrate periodic progress towards the ultimate construction goal.⁴⁷

Therefore, WCA proposes that LMDS licensees also be required to offer service to at least 20% of the service area after one year and 50% of the service area. These benchmarks have been designed to provide LMDS licensees a reasonable opportunity to introduce service to the public gradually (to 20% the first year, 30% the second year, and 40% the third year), without risking spectrum warehousing.

⁴⁷See, e.g., Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 6 FCC Rcd 2356, 2367 (1991) ("these [interim] construction requirements will further promote our objective of licensing only qualified applicants."); Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services, 7 FCC Rcd 1630, 1641 (1992) (establishing periodic interim construction benchmarks that "will reduce the number of speculative applications filed and will go a long way towards ensuring that potential licensees intend to construct an IVDS system.").

E. The Commission Should Assure That Suite 12 Cannot Supplant The Commission's Licensing Function Through Its Patent.

Although it acknowledges that "Suite 12's patented technology [is] the only equipment which appears to be capable of providing direct customer services in the 28 GHz band at this time," the NPRM is strangely silent regarding the implications of Suite 12's monopoly.⁴⁸ In earlier rounds of this proceeding, both Video/Phone Systems, Inc. and WCA called upon the Commission to require, at least during the initial development of the 28 GHz band, that any patents underlying type-accepted equipment capable of providing 28 GHz service be licensed on reasonable terms and conditions.⁴⁹ WCA renews that call here.

Historically, the Commission has insisted upon the equitable licensing of patents when necessary "to assure that the availability of . . . radio apparatus capable of meeting performance standards established by the Commission's rules and regulations will not be prejudiced by unreasonable royalty or licensing policies of patent-holders."⁵⁰ That policy should be implemented here.

⁴⁸NPRM, *supra* note 1, at ¶ 20.

⁴⁹See Petition of Video/Phone Systems, Inc. for Rulemaking, RM-7722, at 33 (filed Jan. 15, 1992); Comments of Wireless Cable Ass'n, Int'l, RM-7872, at 6 (filed Jan. 15, 1992).

⁵⁰"Revised Patent Procedures of the Federal Communications Commission," 3 F.C.C.2d 26 (1961). See also Amendment of Part 3 of the Commission's Rules and Regulations to Permit FM Broadcast Stations to Transmit Stereophonic Programs on a Multiplex Basis, 21 Rad. Reg. 1605, 1615 (1961); Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, FCC 91-337, MM Docket No. 87-268 (rel. Nov. 8, 1991).

The need for an explicit LMDS patent licensing policy arises because, according to Suite 12, "Suite 12's U.S. patent covers all low-power television systems that use (1) an array of omni-directional transmitters, and (2) a plurality of directional receiving units that receive a signal from only one of the omni-directional transmitters in the array."⁵¹ More recently, the press has reported that Suite 12 will "franchise" its system;⁵² suggesting that Suite 12 may intend to do more than passively permit Commission-chosen LMDS licensees to utilize its technology. As a result, Suite 12 could effectively frustrate the fullest development of the 28 GHz band by adopting unreasonable royalty or licensing policies.⁵³ While WCA certainly has no interest in depriving Suite 12 or any patent holder of its just rewards, it is not in the public interest that patent disputes frustrate the introduction of LMDS to the public or that Suite 12 effectively supplant the Commission as the arbiter of who can, and who cannot, offer LMDS. To avoid that prospect, the Commission should do as it has in similar situations and adopt equitable patent licensing

⁵¹Petition to Deny of The Suite 12 Group, File Nos. 10797-CF-P-91, at 13, n.29 (filed June 14, 1991)(emphasis added).

⁵²Lambert, "FM Wireless TV To Bite The Apple," Broadcasting, 46 (Dec. 21, 1992).

⁵³In the past, Suite 12 has proclaimed a willingness to liberally license its technology, citing its issuance of over 50 such licenses. See Reply of Suite 12 Group, RM-7872, at 8 (Filed Jan. 30, 1992). However, as WCA has previously noted, most of those licenses were apparently issued to friends, relatives and business associates of Suite 12's principals. Letter from Paul J. Sinderbrand, Esq. to Hon. Alfred C. Sikes, at 3 n.3 (dated Feb. 12, 1992).

requirements for those securing type acceptance of equipment capable of providing LMDS.⁵⁴

III. CONCLUSION.

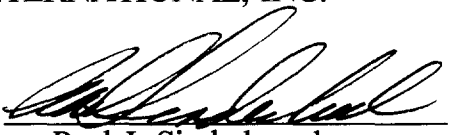
If the technology pioneered by Suite 12 proves to be anywhere near as powerful as Suite 12 claims, LMDS will be an invaluable addition to the array of communications services available to the public. However, the hype surrounding this technology, coupled with the lack of real world data, should give the Commission pause. Despite the pressing need of many wireless cable operators for additional channel capacity, WCA must counsel caution at this time. Simply put, the Commission must fully understand both the capabilities and the limitations of the 28 GHz band before it promulgates a regulatory

⁵⁴See supra note 50.

scheme that will last for years. At this time, the record lacks the real world operating data necessary to assure that the 28 GHz band is governed to best serve the public interest.

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March 16, 1993